

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

v.

DIXIE ELLEN RANDOCK,
STEVEN KARL RANDOCK, SR.,
HEIDI KAE LORHAN,
ROBERTA LYNN MARKISHTUM,

Defendants.

NO. CR-05-180-LRS-1
CR-05-180-LRS-2
CR-05-180-LRS-6
CR-05-180-LRS-7

**ORDER DENYING MOTIONS
TO SUPPRESS AND DISMISS**

BEFORE THE COURT are the Defendants' Motion To Suppress Evidence (Ct. Rec. 328) and the Defendants' Motion To Dismiss Indictment, Or Alternatively, Suppress Evidence (Ct. Rec. 342).

On October 15-18 and November 13-16, 2007, an evidentiary hearing was conducted on these motions in Spokane. Concluding oral arguments were heard in Yakima on January 10, 2008. The court has considered the evidence presented (testimony and exhibits) and the oral arguments in making these rulings.

I. BACKGROUND

In January 2005, the United States Secret Service initiated an investigation into a number of Internet-based virtual schools that were alleged to have fraudulently sold high school and college degrees. A number of the schools were

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1 believed to be operating out of an office leased by Defendant Steven Karl
2 Randock, Sr., located in the basement of a building, the Post Falls Professional
3 Center, at 601 E. Seltice Way, Suite 8B, Post Falls, Idaho.

4 On March 24, 2005, John E. Neirinckx, II, an agent with the United States
5 Secret Service, and other agents of the Secret Service, including Agent Greg Ross
6 and Agent Kevin Miller, went to the Post Falls Professional Center. The basis for
7 the Secret Service to suspect, prior to March 24, 2005, that the schools were
8 operating out of this office is detailed in the March 29, 2005 "Affidavit of John E.
9 Neirinckx, II," (Ex. 1 to Ct. Rec. 360 at pp. 3-20, Paragraphs 6-25) which was
10 submitted in support of a search warrant issued on that date. In the information
11 the Secret Service had obtained prior to March 24, 2005, "A+ Institute" and
12 "AEIT" were business names that had come up repeatedly in connection with the
13 office located at 601 E. Seltice Way, Suite 8B, Post Falls, Idaho.

14 According to Neirinckx in his affidavit (Paragraph 26):

15 On 3/24/05, Your Affiant observed approximately 7 boxes
16 in a hallway within the building located at 601 E. Seltice
17 Way, Post Falls, ID. The aforementioned hallway is
18 located adjacent to suite 8B, and shares a common
19 wall with suite 8B. I noticed many of the boxes contained
files and what appeared to be documents and other articles
within those files. I also noticed that some of the files had
information written on them to include: "AEIT" and "A+
Institute."

20 There was a door to this hallway off of what has been referred to as the
21 "main hallway" in the basement of the Post Falls Professional Center. Located
22 within the subject hallway on one side was a door leading to Suite 8B, and off to
23 the other side, was another door leading to five individually locked storage units
24 which businesses could rent for storage purposes.

25 On March 29, 2005, based on the information contained in the Neirinckx
26 affidavit, District of Idaho U.S. Magistrate Judge Mikel H. Williams authorized a
27 search of the hallway (Attachment A to Application And Affidavit For Search
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1 Warrant, Ex. 1 to Ct. Rec. 360 at p. 53) and seizure of various items contained in
2 the boxes.¹ The list of items to be seized included “[p]apers, documents, notes,
3 financial and business records, ‘diplomas,’ school ‘transcripts,’ e-mail
4 correspondence in written form, and computer disks, contained in approximately 7
5 boxes located in the above described hallway, which are related to “AEIT,” “A+
6 Institute” and other businesses affiliated with Suite 8B.” (Attachment B to
7 Application And Affidavit For Search Warrant, Ex. 1 to Ct. Rec. 360 at p. 54).

8 On March 29, the warrant was executed and the Secret Service seized 11
9 boxes of material located in the subject hallway. (Ex. 1 to Ct. Rec. 360 at p. 50).
10 After seizing the boxes, Agent Neirinckx posted a handwritten note on the wall
11 above the area in the hallway where the boxes had been seized. This note stated
12 that an “angry tenant” had taken the boxes to the county landfill. The warrant was
13 executed at approximately 5:15 p.m. A copy of the warrant and receipt was
14 subsequently served by Agent Neirinckx on Ray Guerra, the landlord of the Post
15 Falls Professional Center, at Mr. Guerra’s home.

16 Approximately eight weeks later, on May 26, 2005, Defendant Roberta
17 Markishtum, who worked in Suite 8B of the Post Falls Professional Center,
18 contacted the Post Falls Police Department and reported the boxes had been
19 stolen. Post Falls Police Officer Kristi Mattson interviewed Markishtum. On May
20 27, Neirinckx spoke with Post Falls Police Detective Dave Beck who had been
21 assigned to investigate the “theft” at Suite 8B. Neirinckx informed Beck that the
22 boxes stolen were likely the same boxes which had been seized by the Secret
23 Service pursuant to the March 29 warrant. Neirinckx requested Beck’s assistance
24 in confirming who owned the boxes and Beck agreed to the same.

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26
27 ¹ Although the Magistrate Judge dated the warrant “March 28,” the court
28 believes this was a mistake and there is nothing suggesting to the contrary.

1 On May 31, 2005, Beck made contact with Defendants Steven Randock,
2 Dixie Randock and Roberta Markishtum at Suite 8B. Spokane Police Department
3 Fraud Unit Detective Bryan Tafoya accompanied Beck. Tafoya was part of the
4 Secret Service task force, Operation Gold Seal, investigating the alleged "diploma
5 mill" being operated by the Defendants. Tafoya asked for blank copies of some of
6 the business forms that AEIT (Advanced Education Institute Trust) routinely used
7 so as to become familiar with the type of records that had been "stolen." Dixie
8 Randock and Roberta Markishtum provided Tafoya with copies of certain
9 documents. Beck expressed interest in collecting badges and seals and he was
10 provided with some foil seals bearing the name "Association of International
11 Educational Assessors" (AEIA).

12 On June 6, 2005, Tafoya and Beck returned to Suite 8B to re-interview
13 Markishtum. During this interview, Beck once again expressed interest in some
14 seals he saw on Markishtum's work station. Markishtum gave Beck two foil seals
15 bearing the name "National Board Of Education" (NBOE).

16 On June 8, 2005, Tafoya interviewed Amy Hensley who also worked for
17 AEIT and whom during the May 31 interview the Randocks identified as one of
18 their employees. The interview with Hensley did not occur at Suite 8B, however.
19 It occurred at Hensley's new place of employment.

20 On August 10, 2005, the Secret Service obtained seven search warrants
21 which were executed on August 11 at the following locations: 1) the residence of
22 Dixie and Steven Randock in Colbert, Washington; 2) Heidi K. Lorhan's
23 residence in Veradale, Washington; 3) Amy Hensley's residence in Spokane; 4)
24 Richard J. Novak's residence in Peoria, Arizona; 5) Suite 8B in the Post Falls
25 Professional Center; 6) 14525 North Newport Highway, Mead, Washington; and
26 7) Northwest Business Stamp located in Spokane.

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1 On October 5, 2005, a grand jury returned an Indictment against the
2 Defendants. All of the Defendants are charged in Count 1 with Conspiracy To
3 Commit Mail Fraud and Wire Fraud in violation of 18 U.S.C. §§371, 1341, and
4 1343. Defendant Dixie and Steven Randock are also charged in Count 2 with
5 Conspiracy To Launder Monetary Instruments in violation of 18 U.S.C. §1956(h).

6 7 **II. DISCUSSION**

8 **A. March 24, 2005 “Search”**

9 “A [Fourth Amendment] ‘search’ occurs when an expectation of privacy
10 that society is prepared to consider reasonable is infringed.” *United States v.*
11 *Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652 (1984). A reasonable expectation of
12 privacy in the area searched is required. *Katz v. United States*, 389 U.S. 347, 360,
13 88 S.Ct. 507 (1967). A reasonable expectation of privacy exists if one has an
14 actual, subjective expectation of privacy and if the expectation is one society is
15 prepared to recognize as reasonable. *Id.* at 361. The expectation of privacy in a
16 commercial area is lower than that in a residential area. *Minnesota v. Carter*, 525
17 U.S. 83, 119 S.Ct. 469, 474 (1998)(“[p]roperty used for commercial purposes is
18 treated differently for Fourth Amendment purposes than residential property”);
19 *New York v. Burger*, 482 U.S. 691, 700, 107 S.Ct. 2636 (1987)(“expectation of
20 privacy in commercial premises . . . is different from, and indeed less than, a
21 similar expectation in an individual’s home”). It is the Defendants’ burden to
22 establish that under the totality of the circumstances, they had a legitimate
23 expectation of privacy in the hallway in which the boxes were located. *Rawlings*
24 *v. Kentucky*, 448 U.S. 98, 104, 100 S.Ct. 2556 (1980).

25 This court concludes that Defendants did not have a reasonable expectation
26 of privacy in the subject hallway and hence, the discovery of the boxes on March
27 24, 2005 by Agent Neirinckx did not constitute a “search” for Fourth Amendment

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1 purposes. Because there was no reasonable expectation of privacy in the area
2 searched, none of the Defendants can claim the protection of the Fourth
3 Amendment and therefore, none of them have standing to challenge the “search”
4 that occurred on March 24, 2005. *U.S. v. Paopao*, 469 F.3d 760, 764 (9th Cir.
5 2006). “A privacy interest in the place or thing searched is always required in
6 order for a defendant to challenge the search.” *Id.* at 765.

7 The preponderance of the evidence establishes that the door off the main
8 hallway to the secondary hallway in which the boxes were located was not
9 equipped with a lock and therefore, access to the secondary hallway by the public
10 and other building tenants was not restricted.² Defendants Markishtum and
11 Hensley testified the door did have a lock at one period of time, and that the lock
12 must have been subsequently removed. They are not as credible as the witnesses
13 who testified the door was not equipped with a lock. In this regard, the court notes
14 the conflicting statements Markishtum provided as to when she last saw the boxes
15 in the hallway, as well as her admission to the use of aliases, and her admission
16 that she falsely represented to the public that in her employment with OTAC
17 (Official Transcript Archive Center), she was physically located in Delaware.
18 Hensley has pled guilty to Count 1 of the Indictment charging her with Conspiracy
19 To Commit Wire Fraud and Mail Fraud. Hensley acknowledged telling Safeco
20 Special Investigator Traci Johnson in an interview on July 7, 2005 that “[A]s far as
21 I know,” there was a keyed entry from the outside of the door. Hensley also
22 admitted that as a result of coaching from Dixie Randock prior to the interview,
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24 ² The burden of proof on the government in a suppression hearing is
25 preponderance of the evidence since guilt or innocence is not being determined.
26 *U.S. v. Matlock*, 415 U.S. 164, 178 n. 14, 94 S.Ct. 988 (1974), citing *Lego v.*
27 *Twomey*, 404 U.S. 477, 488-89, 92 S.Ct. 619 (1972).

1 she was evasive with Johnson and indeed, told her several falsehoods. Defendant
2 Steven Randock testified that in late July or early August 2004, he inspected Suite
3 8B and at that time, he looked inside the subject hallway “briefly” and noticed a
4 “twisty type” lock on the interior of the door leading into the main hallway. He
5 acknowledges he spent only a total of roughly ten minutes inspecting Suite 8B
6 before subsequently signing a lease for Suite 8B. Mr. Randock testified he
7 subsequently visited Suite 8B approximately five times prior to May 31, 2005, but
8 on those occasions he never looked inside the interior of the subject hallway.³

9 There were no signs on or around the door to the secondary hallway
10 indicating access by the public was restricted. The Defendants did not exercise
11 control over access to the hallway. The hallway was a common area and did not
12 qualify as “business curtilage” of Suite 8B. The hallway was not part of the leased
13 space of Suite 8B. Furthermore, the court finds credible the testimony of Agent
14 Nierinckx that he found the hallway door partially open on March 24, 2005,⁴
15 although even had the door been closed, that would not have created a reasonable
16 expectation of privacy in a hallway area that was located behind an unlockable
17 door in a commercial building readily accessible to the public, as well as to other
18 tenants in the building. It is noted that all of the Defendants who worked in Suite
19 8B and/or who had placed material in the hallway either knew or had reason to
20 know that other tenants in the building had ready access to the area, inasmuch as
21 miscellaneous furniture and other materials were stored therein.

22 Without a reasonable expectation of privacy in the hallway, the Defendants
23 did not have a reasonable expectation of privacy in the contents of the boxes,

25 ³ Defendant Dixie Randock testified that she had not visited Suite 8B prior
26 to the May 31, 2005 meeting with Detectives Beck and Tafoya.

27 ⁴ This testimony was corroborated by the testimony of Agent Greg Ross.
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1 particularly when the boxes were not clearly marked as belonging to the tenants of
2 Suite 8B as their personal and business effects, and there were no lids on many of
3 the boxes. The court, however, finds credible the testimony of the Secret Service
4 agents that they did not examine the contents of the boxes in the hallway on March
5 24, 2005.⁵

6 Had the agents examined the contents, and assuming the Defendants had a
7 reasonable expectation of privacy in the contents as their personal or business
8 effects, a warrantless Fourth Amendment search of those contents would have
9 been justified based on the “plain view” exception. The plain view exception
10 requires that: (1) the initial intrusion must be lawful; and (2) the incriminatory
11 nature of the evidence must be immediately apparent to the officer. *United States*
12 *v. Garcia*, 205 F.3d 1182, 1187 (9th Cir.), *cert. denied*, 531 U.S. 856 (2000). See
13 also *United States v. Bradley*, 321 F.3d 1212, 1214-15 (9th Cir. 2003)(observations
14 of contraband inside residence when police executed warrantless entry to check on
15 safety of nine-year old could be used to support search warrant application
16 because items were in plain view). As there was no reasonable expectation of
17 privacy in the hallway, the agents’ “intrusion” into the hallway was lawful.
18 Furthermore, the court finds credible the testimony of Agents Neirinckx and Ross
19 that plainly visible to them in the boxes were files or folders with information
20 written on the headings including “AEIT” and “A+ Institute.” The incriminatory
21 nature of this evidence would have been immediately apparent to the agents so as
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23 ⁵ Defendants maintain there were lids on the boxes and that the agents must
24 have gone through the boxes to know that computer disks were contained therein,
25 items which in the March 29 application for a search warrant were specifically
26 listed as items to be seized. Pictures taken on the scene clearly suggest that few, if
27 any, of the boxes were secured with lids, and that files were placed in such a
28 fashion that computer disks, as well as papers and records, would have easily been
visible in at least some of the boxes even before they were moved.

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1 to justify further investigation of the contents of the boxes.

2 No Fourth Amendment “search” occurred on March 24, 2005.

3 Alternatively, if any Fourth Amendment search did occur without a warrant, it was
4 justified by the “plain view” exception. Accordingly, nothing which occurred on
5 March 24, 2005 tainted the search warrant subsequently obtained on March 29.

6 7 **B. The March 29, 2005 Search Warrant**

8 **1. Omissions In The Affidavit**

9 Defendants note that Agent Neirinckx’s affidavit in support of this warrant
10 did not mention there was any door to the hallway in which the boxes were
11 discovered. (Paragraph 26 to Neirinckx Affidavit, Ex. 1 to Ct. Rec. 360).

12 The court finds this was not an intentional or reckless omission. Since
13 Agent Neirinckx found the door partially open, the fact he did not mention the
14 existence of the door is not particularly surprising and any significance of there
15 being a door to the hallway was markedly diminished, if not eliminated. Had
16 Agent Neirinckx informed the Magistrate Judge of the partially open door, this
17 court believes the Magistrate Judge would still have issued the warrant by finding
18 that no reasonable expectation of privacy of the Defendants was infringed by the
19 agents in their discovery of the boxes in the hallway, and that there was still
20 probable cause to search the hallway and seize the boxes..

21 22 **2. Particularity Of The Warrant**

23 Defendants note that Attachment A to the March 29, 2005 warrant stated the
24 hallway to be searched was to the “West of suite 8B,” when it was in fact to the
25 north of Suite 8B.

26 There must be sufficient particularity in a warrant so as to give meaningful
27 guidance to searching officers. *United States v. Clark*, 31 F.3d 831, 836 (9th Cir.

1 1994). The purpose of the requirement is to prevent a “general, exploratory
2 rummaging.” *Coolidge v. New Hampshire*, 403 U.S. 443, 467, 91 S.Ct. 2022
3 (1971).

4 Agent Neirinckx testified that Attachment A mistakenly indicated the
5 hallway was to the “West of suite 8B.” Agent Neirinckx, however, knew exactly
6 where the hallway to be searched was located. The mistake had no adverse impact
7 upon the Defendants. The hallway to the “West of suite 8B” was the main
8 hallway. Nothing belonging to the Defendants was located in that hallway which
9 the public used to access entrances to the various businesses located on the
10 basement floor of this commercial building. Additionally, the area to be searched
11 was, in effect, an extension of the main hallway and adjacent thereto. Any error in
12 the use of the term “West” rather than “North” could not have misled the
13 Magistrate Judge issuing the search warrant in light of all the detailed information
14 provided concerning the actual area to be searched.

15 16 **3. Execution Of Warrant**

17 In 2005, Fed. R. Crim. P. 41(f)(3) provided that:

18 The officer executing the warrant must: (A) give a copy of
19 the warrant and a receipt for the property taken to the person
20 from whom, or from whose premises, the property was taken;
or (B) leave a copy of the warrant and receipt at the place
where the officer took the property.

21 Agent Neirinckx served the warrant and the receipt on Ray Guerra, the
22 landlord of the Post Falls Professional Center. The search was not executed until
23 5:15 p.m., after the normal close of business for most offices. Defendants contend
24 Agent Neirinckx acted with intentional and deliberate disregard of Rule 41(f)(3)
25 and that this is a violation of the Fourth Amendment because a copy of the search
26 warrant was served on the landlord who did not own any of the property that was
27 taken, and the agent knew well whose property was taken.

1 The policies underlying the warrant requirement include “providing the
 2 property owner assurance of the lawful authority of the executing officer, his need
 3 to search, and the limits of his power to search.” *United States v. Celestine*, 324
 4 F.3d 1095, 1100-01 (9th Cir. 2003). “[A]bsent exigent circumstances, if a person is
 5 present at the search of her premises, [Rule 41(f)] requires officers to give her a
 6 complete copy of the warrant at the outset of the search.” *United States v. Gantt*,
 7 194 F.3d 987, 1005 (9th Cir. 1999).

8 In the case at bar, there was no violation of Rule 41(f)(3). Copies of the
 9 warrant and receipt were served on Ray Guerra, “the person . . . from whose
 10 premises[] the property was taken.” The boxes were not located in Suite 8B, but
 11 in a common public hallway in the Post Falls Professional Center. Defendants
 12 leased Suite 8B. They did not lease the hallway and so the hallway does not
 13 qualify as their “premises.” A plain reading of Rule 41(f)(3) does not, by its
 14 terms, require the warrant and receipt to have been served on the tenant of Suite
 15 8B or an employee who worked there. The court has no authority to add such a
 16 provision under the guise of legal interpretation, particularly in the absence of any
 17 case law to the contrary. Moreover, a finding that there is no Rule 41(f)(3)
 18 violation is consistent with the finding that Defendants had no reasonable
 19 expectation of privacy in the hallway.⁶

20 21 **4. Inventory Requirements**

22 In 2005, Fed. R. Crim. P. 41(f)(2) provided:

24 ⁶ Likewise, the fact Defendants had no reasonable expectation of privacy in
 25 the hallway renders insignificant the fact the warrant was executed after the close
 26 of business. There is some question whether Guerra was served with Attachment
 27 A and Attachment B to the warrant. Guerra, however, is the only one who would
 28 have standing to assert any such deficiency.

1 An officer present during the execution of the warrant
2 must prepare and verify an inventory of any property
3 seized. The officer must do so in the presence of
4 another officer and the person from whom, or from
5 whose premises, the property was taken. If either one
6 is not present, the officer must prepare and verify
7 the inventory in the presence of at least one other
8 credible person.

9 The record indicates that Agent Greg Ross, who was not present during the
10 execution of the warrant on March 29, verified on April 22, 2005, an inventory of
11 the items seized. (Ex. 1 to Ct. Rec. 360 at Bates p. 50).⁷ To the extent there was
12 any violation of Rule 41(f)(2), however, it does not require suppression of the
13 items seized.

14 Suppression is “rarely the proper remedy for a Rule 41 violation.” *U.S. v.*
15 *Williamson*, 439 F.3d 1125, 1132 (9th Cir. 2006), quoting *United States v.*
16 *Calandra*, 414 U.S. 338, 348 n. 6, 94 S.Ct. 613 (1974)(Federal Rules of Criminal
17 Procedure do “not constitute a statutory expansion of the exclusionary rule”).
18 “Only a ‘fundamental violation of Rule 41 requires automatic suppression, and a
19 violation is ‘fundamental’ only where it, in effect, renders the search
20 unconstitutional under traditional fourth amendment standards.” *United States v.*
21 *Johnson*, 660 F.2d 749, 753 (9th Cir. 1981). There are three circumstances under
22 which evidence obtained in violation of Fed. R. Crim. P. 41 requires suppression:
23 (1) the violation rises to a “constitutional magnitude;” (2) the defendant was
24 prejudiced, in the sense that the search would not have occurred or would not have
25 been so abrasive if law enforcement had followed the Rule; or (3) officers acted in
26 “intentional and deliberate disregard” of a provision in the Rule. *Williamson*, 439

27 ⁷ The “inventory” is distinguishable from the “receipt” that was served on
28 Mr. Guerra on March 29. What Ross signed is titled a “Certification” and it was
signed and subscribed before District of Idaho Magistrate Judge Larry M. Boyle
on April 22, 2005.

1 F.3d at 1133.⁸

2 Any violation of Rule 41(f)(2) in the case at bar did not render the March 29
3 search unconstitutional. The inventory occurred subsequent to the search.
4 Defendants were not prejudiced as the search would have occurred in any event,
5 and the manner in which the inventory was prepared and verified had no bearing
6 on the manner in which the search was conducted. *See United States v. Dudek*,
7 530 F.2d 684, 688 (6th Cir. 1976) (“[F]ailure to follow the requirements of Rule 41
8 of the Federal Rules of Criminal Procedure pertaining to inventory of objects
9 seized and prompt return to the court has been held not to require invalidation of
10 an otherwise properly issued and executed search warrant or the suppression of
11 evidence acquired under it”). Finally, even if any violation of Rule 41(f)(2) was
12 intentional, the court was not presented with evidence indicating that any violation
13 was committed deliberately so as to result in some type of prejudice to the
14 Defendants.

15 16 **C. Alleged “Outrageous” Conduct**

17 Defendants contend the note left by Agent Neirinckx indicating the boxes
18 had been taken by an “angry tenant” and could be found at the landfill had the
19 desired effect of causing Defendants to contact law enforcement about a “theft”
20 which, in turn, provided law enforcement with an opportunity to gain access to
21 Suite 8B. Defendants contend Detectives Beck and Tafoya intentionally and
22 deliberately misrepresented their true purpose in contacting the Defendants which
23 was to investigate the alleged “diploma mill” being operated out of Suite 8B.

24 At the outset, the court finds the preponderance of the evidence indicates
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26 ⁸ *Williamson* did not involve any of Rule 41's inventory requirements. The
27 challenge there pertained to the failure of searching officers to present a complete
28 copy of the warrant at the outset of the search.

1 the overwhelming primary purpose of the aforementioned ruse was to assist the
2 Operation Gold Seal task force with their investigation of what it believed was a
3 “diploma mill” being operated out of Suite 8B. Suspected insurance fraud on the
4 part of the Defendants was, at best, a very minor and secondary consideration.

5 In order to warrant dismissal on due process grounds, government
6 misconduct must be “so grossly shocking and so outrageous as to violate the
7 universal sense of justice.” *United States v. King*, 200 F.3d 107, 1213 (9th Cir.
8 1999). A defendant “must prove that the government’s conduct was ‘so excessive,
9 flagrant, scandalous, intolerable, and offensive as to violate due process.’” *United*
10 *States v. Edmonds*, 103 F.3d 822, 825 (9th Cir. 1996), quoting *United States v.*
11 *Garza-Juarez*, 992 F.2d 896, 904 (9th Cir. 1993), *cert. denied*, 510 U.S. 1058
12 (1994). The Ninth Circuit has found outrageous government conduct in instances
13 where the government has engineered and directed the criminal enterprise from
14 start to finish and where the police have been brutal, employing physical or
15 psychological coercion against a defendant. *U.S. v. Fernandez*, 388 F.3d 1199,
16 1238 (9th Cir. 2004). The Ninth Circuit has identified two remedies: 1) dismissal
17 of the indictment, which is drastic, disfavored, and thus used only in the most
18 egregious cases; or 2) suppression at trial of evidence improperly obtained.
19 *United States v. Haynes*, 216 F.3d 789, 796 (9th Cir. 2000), *cert. denied*, 531 U.S.
20 1078 (2001).

21 The government and the Defendants have cited various cases for their
22 respective positions, but to no great surprise, none of those cases present the
23 unique factual circumstances present in the case at bar. In *United States v. Bosse*,
24 898 F.2d 113 (9th Cir. 1990), the defendant was a licensed semiautomatic firearms
25 dealer and had an application pending for a state license to buy and sell automatic
26 machine guns. An agent of the California Department of Justice inspected the
27 defendant’s home and surrounding premises with defendant’s consent as part of
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1 the license application process. A federal Alcohol, Tobacco and Firearms (ATF)
2 agent accompanied the state inspector on the search without identifying himself as
3 an ATF agent. Subsequently, the ATF sought and obtained a search warrant for
4 the defendant's home.

5 It was undisputed that the ATF Agent had accompanied the state inspector
6 not for the purpose of assisting the inspector, but rather to further the ATF agent's
7 investigation into possible federal firearms violations. The ATF agent testified he
8 accompanied the state inspector in his capacity as a federal agent and prepared
9 diagrams of the layout of the defendant's house in preparation for obtaining and
10 executing a search warrant. The state inspector identified himself to the defendant
11 as a state agent conducting an inspection in connection with the defendant's
12 pending license application and explained that the ATF agent "is with me." The
13 Ninth Circuit Court of Appeals found that in these circumstances, the ATF agent's
14 silence amounted to a deliberate misrepresentation that his purpose was that
15 announced by the state inspector, and therefore a deliberate misrepresentation of
16 his true purpose. The circuit held the ATF agent's surreptitious entry into the
17 home was illegal. *Id.* at 115.

18 One of the cases cited in the *Bosse* decision was *United States v. Phillips*,
19 497 F.2d 1131 (9th Cir. 1974). In *Phillips*, a federal agent, in order to gain entry
20 into the defendant's office building, asked Santa Monica police officers for help.
21 Under the direction of the federal agent, the uniformed officers knocked on the
22 door and asked permission to enter to investigate a report of burglary in the
23 building. There was no such report, however, as it had been invented by the
24 federal agent. After some delay, the door was opened by an occupant and the
25 uniformed policemen entered, followed immediately by undercover narcotics
26 agents, who had emerged from hiding. The occupants of the building were led to
27 believe they were admitting officers to investigate a burglary when, in fact, the
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1 officers and agents were entering to arrest the defendant.

2 The Ninth Circuit held the entry and the subsequent arrest of the defendant
3 (Phillips) were invalid because the agents did not have probable cause to believe
4 the defendant was in his office at the time of the raid. *Id.* at 1136. “An agent must
5 have probable cause to believe that the person he is attempting to arrest, with or
6 without a warrant, is in a particular building at the time in question before that
7 agent can legitimately enter the building by ruse or any other means.” *Id.*

8 Recently, *Bosse* was cited in *U.S. v. Alvarez-Tejeda*, 491 F.3d 1013 (9th Cir.
9 2007), a case in which federal Drug Enforcement Agents employed an elaborate
10 ruse to seize an automobile. It was undisputed that the DEA agents had the right
11 to seize the car without a warrant. The agents had probable cause to believe the
12 car had been used for carrying contraband because they had purchased drugs from
13 inside it as part of their investigation. They also had probable cause to believe the
14 car was carrying contraband on the day of the seizure based on several intercepted
15 phone calls and direct surveillance. The only issue was the unorthodox method of
16 seizing the car. With regard to that method, the Ninth Circuit Court of Appeals
17 held:

18 Nor was there anything unreasonable in the agents’ choice
19 of guile to seize the car, rather than taking it outright, as
20 they were entitled to do. While we don’t generally second-
21 guess the government’s use of stealth to ferret out criminal
22 activity . . . we take a closer look when agents identify
23 themselves as government officials but mislead suspects as
24 to their purpose and authority. This because people “should
25 be able to rely on [the] representations of government
26 officials. *United States v. Bosse*, 898 F.2d 113, 115 (9th
27 Cir. 1990)(per curiam)(internal quotation marks omitted).
28 If people can’t trust the representations of the government
officials, the phrase “I’m from the government and I’m
here to help” will become even more terrifying.

This concern is at its zenith when government officials
lie in order to gain access to places and things they
would otherwise have no legal authority to reach. . . .
This consideration is not implicated by the agents’
actions here because they already had the authority

1 to seize the car and arrest Alvarez-Tejeda; their lies
2 didn't have the effect of expanding their ostensible
3 authority beyond the scope of their actual authority.
4 The only consequence of their deceit was to treat
5 Alvarez-Tejeda as a victim, rather than a criminal
6 suspect-driving him to a hotel rather than immediately
7 dragging him off to jail- and the only harm he suffered
8 was being misled and subjected to the fright that comes
9 from being a crime victim. We find the agents' actions
10 in misleading Alvarez-Tejeda were reasonable in light
11 of their vital interest in seizing the drugs and not
12 exposing their investigation.

13 *Id.* at 1017.

14 While the Ninth Circuit Court of Appeals "take[s] a closer look when agents
15 identify themselves as government officials but mislead suspects as to their
16 purpose and authority," there is no rule that whenever agents engage in this kind
17 of activity it is *per se* unconstitutional and illegal. So too, this court has taken a
18 closer look to determine whether the ruse perpetrated in the case at bar constitutes
19 "outrageous" conduct.

20 Conflicting testimony was offered at the evidentiary hearing as to whether
21 Detective Tafoya identified himself as a member of the Post Falls Police
22 Department when he in fact is a Spokane police officer who had been assigned to
23 the Operation Gold Seal task force to assist in the "diploma mill" investigation.
24 Defendants testified that Tafoya identified himself as a Post Falls police officer
25 during their contact with him on May 31, 2005. Tafoya testified that he said
26 nothing about the nature of his official position and that the Defendants never
27 asked him about it.⁹ Certainly, under the circumstances it would have been
28 reasonable for the Defendants to assume Tafoya was with the Post Falls Police
Department since the Defendants had reported the "theft" to the Post Falls Police
Department and Tafoya was accompanied by Detective Beck who did identify

⁹ Detective Beck corroborated Tafoya's testimony on this point and also testified that he did not recall specifically identifying Tafoya as his partner.

1 himself as a Post Falls police officer and left a business card with the Defendants
2 confirming the same. There is no doubt Tafoya hoped the Defendants would
3 assume he was a member of the Post Falls Police Department. The court finds
4 credible Tafoya's testimony that he did not say anything to the Defendants about
5 the nature of his official position and that he was not asked about it by the
6 Defendants.¹⁰ The court also finds that this does not rise to the level of the
7 "affirmative or deliberate" misrepresentation at issue in *Bosse* where the state
8 inspector specifically advised the defendant that the ATF agent "is with me."¹¹
9 Furthermore, in *Bosse*, the state inspector was truly conducting a state inspection

11 ¹⁰ The Defendants who testified at the hearing are not credible on this
12 factual matter. See pp. 6-7 *supra*.

13 ¹¹ Nor does it rise to the level of the affirmative misrepresentation at issue in
14 *United States v. Stringer*, 408 F.Supp.2d 1083 (D. Or. 2006). In *Stringer*, a
15 district court dismissed indictments, and alternatively ordered evidence
16 suppressed, where it found egregious government misconduct in concealing in a
17 civil securities investigative proceedings the fact that criminal prosecutions were
18 already contemplated and for which the civil proceedings were being used to
19 gather evidence. In response to direct questions by defendant's attorney, a
20 Securities Exchange Commission (SEC) attorney affirmatively misrepresented that
21 the defendant Stringer was not the "target" of any investigation and that the SEC
22 was not working in conjunction with the U.S. Attorney's Office regarding a
23 possible criminal investigation. *Id.* at 1087-89, citing among other cases, *United*
24 *States v. Tweel*, 550 F.2d 297, 300 (5th Cir. 1977). The court noted it is a due
25 process violation if government agents make affirmative misrepresentations as to
26 the nature or existence of parallel proceedings and that a government agency may
27 not develop a criminal investigation under the auspices of a civil investigation.
28 Because the defendants were identified as subjects of a criminal investigation, the
government's tactic to move forward under the guise of a civil investigation
violated defendants' due process rights. *Id.* at 1089, citing *United States v.*
Robson, 477 F.2d 13, 18 (9th Cir. 1973).

1 and the ATF agent used that as a reason to gain entry into the defendant's home,
2 whereas in the case at bar, both Beck (the Post Falls police officer) and Tafoya
3 (the federal task force officer) went to Suite 8B for the ostensible purpose of
4 investigating a "theft," although they both knew it was likely that the boxes in
5 question were those that had been taken by the Secret Service on March 29.¹²

6 That, however, is not the end of the inquiry, nor the most important
7 component of the due process analysis. There is no discussion in *Bosse* whether
8 the ATF agent already had probable cause to enter and search the defendant's
9 home before he entered the home with the assistance of the state inspector. It
10 appears the ATF agent did not have such probable cause ("Rusin accompanied
11 Dunkin not for the purpose of assisting in the state licensing inspection, but rather
12 to further Rusin's investigation into **possible** federal firearms violations"). *Bosse*,
13 898 F.2d at 115(emphasis added). The ATF agent testified he wanted to gain
14 entry to gather information to assist him in obtaining a search warrant. In other
15 words, probable cause had not yet been established. A search warrant was
16 subsequently issued and it was during that search that a sawed-off shotgun was
17 discovered in the home that led to the federal firearm charge against the defendant.
18 The Ninth Circuit noted the fact the ATF agent's prior entry into the home with
19 the state inspector was illegal did not end the inquiry because it needed to be
20 determined whether the illegal entry tainted the warrant and the probable cause
21 supporting the warrant. In other words, if the warrant- the probable cause- arose
22 from a source entirely independent of the illegal search, suppression of the
23 shotgun was not necessary. The circuit remanded the case to the district court for

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25 ¹² Because Markishtum had reported to Officer Mattson that eight boxes
26 were missing and that she had last seen them on May 12, 2005, there was not
27 absolute certainty by Beck and Tafoya that these were the same boxes (totaling 11
28 in number) as those seized by the Secret Service on March 29, 2005.

1 that determination. *Id.* at 116.

2 In *Phillips*, what was critical was that the federal agents did not have
3 probable cause to believe the defendant was in the office building at the time of
4 the entry that was gained by means of a ruse, that being the fictitious burglary
5 report.¹³ Likewise, in *Alvarez-Tejeda*, what was critical was the agents already had
6 probable cause to believe the car had been used for carrying contraband prior to its
7 seizure by means of a ruse, and had probable cause to believe the car was carrying
8 contraband on the day of that seizure.

9 Agent Neirinckx obtained a search warrant authorizing seizure of the boxes
10 in the common public hallway located adjacent to Suite 8B. The Neirinckx search
11 warrant affidavit established probable cause that there was illegal “diploma mill”
12 activity occurring in Suite 8B which justified seizure of boxes found in a hallway
13 adjacent to Suite 8B. (Neirinckx Affidavit at Paragraphs 6-25, Ex. 1 to Ct. Rec.
14 360). These boxes contained files which, in “plain view,” had written
15 labels/markings identifying businesses the Secret Service had probable cause to
16 believe were associated with Suite 8B. The Secret Service already had probable
17 cause to obtain a search warrant for the interior of Suite 8B at the time it sought a
18 search warrant for the adjacent hallway authorizing seizure of the boxes. The
19 information contained in the boxes strengthened probable cause for the issuance of

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24 ¹³ In *Phillips*, the federal agents made up the burglary report on the spot and
25 there was in fact never any such report. In the case at bar, there was an actual
26 “theft” report filed by the Defendants with the Post Falls Police Department, albeit
27 a report that was precipitated by the deception of the Secret Service in leaving a
28 note that stated the boxes had been taken to the landfill by an “angry tenant.”

1 a search warrant for the interior of Suite 8B.¹⁴ The Secret Service chose not to
2 obtain a search warrant for the interior of Suite 8B prior to the discovery of the
3 boxes or immediately after the discovery. This court finds, and the record bears
4 out, there was a legitimate reason for this. The Secret Service wanted to maintain
5 a covert investigation of the alleged “diploma mill” activity to further reveal the
6 alleged criminal design and conspiracy of the Defendants. As in *Alvarez-Tejeda*,
7 the Secret Service did not want to expose its investigation too early and certainly,
8 that would have occurred had a warrant been obtained and a search of Suite 8B
9 executed in March or May of 2005. Although by March 24, 2005, the Secret
10 Service already had a reasonable suspicion that the Defendants were involved in
11 “diploma mill” activity originating out of Suite 8B¹⁵, the Secret Service still
12 needed to determine the precise roles of the Defendants in this activity, as well as
13 how the various businesses thought to be operating out of Suite 8B were related.
14 Moreover, this was a far-ranging and extensive investigation involving numerous
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17 ¹⁴ There was testimony that examination of the contents of the boxes by the
18 Operation Gold Seal task force occurred soon after seizure of the boxes. The
19 “inventory” was certified by Agent Ross on April 22, 2005, over a month before
20 Beck and Tafoya visited Suite 8B. Information derived from the contents of the
21 boxes was used in procuring the warrants that were issued on August 10, 2005.
(Ex. 5 to Ct. Rec. 361 at Paragraphs 110-112; Ex. 7 to Ct. Rec. 361 at Paragraphs
104-106; and Ex. 8 to Ct. Rec. 361 at Paragraphs 110-112).

22 ¹⁵ See Paragraph 5 of March 29, 2005 Affidavit of Nierinckx (Ex. 1 to Ct.
23 Rec. 360 at p. 29), indicating that in January 2005, based on information obtained
24 from an investigator with the Washington State Attorney General’s Office, the
25 Secret Service commenced its investigation into a number of internet based virtual
26 “schools” selling fraudulent degrees. The investigator from the state attorney
27 general’s office advised that Dixie Randock, Steven Randock, Heidi Lorhan, Amy
28 Hensley, and Robert Markishtum were among the “main suspects” believed to be
operating the schools.

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1 individuals (suspects and non-suspects) in multiple locations in addition to Suite
2 8B (as borne out by the multiple search warrants executed on August 11, 2005).
3 Indeed, the investigation ultimately led to the foreign nation of Liberia which had
4 suspected involvement in the alleged accreditation of internet schools being
5 operated by the Randocks. A search of the interior of Suite 8B in March or May
6 2005 pursuant to a warrant would likely have brought the investigation to a close.
7 Accordingly, the Secret Service resorted to deception to further its investigation of
8 what was actually going on in Suite 8B.

9 The court finds the government did not act unreasonably in choosing to
10 resort to this deception because it already had probable cause to search the interior
11 of Suite 8B. The deception did not have the effect of expanding its ostensible
12 authority beyond the scope of its actual authority. As in *Alvarez-Tejeda*, the
13 consequence of the deceit was to treat the Defendants as victims of a crime rather
14 than as criminal suspects. Also of significance is that the Defendants initiated the
15 contact with law enforcement by reporting the “theft” and inviting law
16 enforcement to undertake an investigation of the “theft.” The Defendants were not
17 coerced into reporting the “theft” to law enforcement. They could have chosen not
18 to file a report. Defendants may argue they were effectively coerced into reporting
19 the “theft” because of sensitive customer information contained in the boxes (i.e.,
20 credit card information), and that is indeed a legitimate reason to report a “theft.”
21 These Defendants, however, whom law enforcement already had reasonable
22 suspicion to believe were involved in defrauding their customers, were not entitled
23 to blithely assume they could ask law enforcement officers to investigate the
24 “theft” without their suspected fraudulent activity being investigated by those
25 same officers. In these particular circumstances, the Defendants were not entitled

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1 to assume that few, if any, questions would be asked and that there would be no
2 potential adverse consequences for them.¹⁶

3 The benchmark for the Fourth Amendment is reasonableness, which
4 requires weighing the government's justification for its actions against the
5 intrusion into the defendant's interests. *Alvarez-Tejeda*, 491 F.3d at 1016.
6 "Artifice and stratagem may be employed to catch those in criminal enterprises[;] .
7 . . to reveal the criminal design; [or] to expose the illicit traffic, . . . the illegal
8 conspiracy, or other offenses." *Lewis v. United States*, 385 U.S. 206, 209 n. 5, 87
9 S.Ct. 424 (1966), quoting *Sorrells v. United States*, 287 U.S. 435, 441-42, 53 S.Ct.
10 210 (1932). Here, the government had a legitimate justification for its deception,
11 that being the preservation of the anonymity of its ongoing investigation. This is
12 not a case where the government engineered and directed the criminal enterprise

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14 ¹⁶ It is noted that the Defendants did not report the "theft" until
15 approximately eight (8) weeks after the seizure, and were vague and evasive when
16 asked about what had been "stolen." For example, when Post Falls Police Officer
17 Mattson spoke to Steven Randock by telephone on May 26, 2005, and asked him
18 if he had any names or numbers that would help identify the files which had been
19 taken, Mattson reported that Randock did not provide any information in that
20 regard. (Mattson Report, Ct. Rec. 342-2 at p. 16). Mattson's testimony at the
21 evidentiary hearing was consistent with her report.

22 On May 31, 2005, when Detective Tafoya asked Dixie Randock what it was
23 that AEIT actually did, she stated it was an on-line document processing center
24 primarily for schools located outside the United States. According to Tafoya,
25 when he asked to what exact schools she was referring, Randock would not name
26 any specific school. And while Randock mentioned that the entity "OTAC"
27 (Official Archive Transcript Center) was somehow attached to Suite 8B, Detective
28 Tafoya says she would not elaborate on what "OTAC" stood for or what its
function was. (Secret Service Report Of Investigation (ROI), Ct. Rec. 342-2 at p.
21). Detective Tafoya's testimony at the evidentiary hearing was consistent with
the information contained in the ROI.

1 from start to finish and/or where the police employed physical or psychological
2 coercion against the Defendants. Instead, law enforcement resorted to deception
3 which, for reasons discussed above, this court does not deem “outrageous.” The
4 government’s conduct was not so excessive, flagrant, scandalous, intolerable, and
5 offensive as to violate due process.¹⁷

6 Assuming for the sake of argument that Defendants’ conduct crossed the
7 line and was “outrageous,” this court would not find that conduct so egregious as
8 to warrant dismissal of the Indictment against Defendants. Instead, the remedy
9 would be suppression of whatever incriminating information or evidence was
10 obtained by Detectives Beck and Tafoya during their May 31 visit to Suite 8B and
11 during their follow-up visit with Markishtum on June 6. It is not apparent,
12 however, that Markishtum or the Randocks made any incriminating statements
13 during these visits. As discussed *supra* (n. 16 at pp. 22-23), the Defendants gave,
14 at best, vague and evasive statements regarding the nature of the business being
15 conducted out of Suite 8B.

16 Brief mention of the visits by Beck and Tafoya to Suite 8B is found in the
17 affidavits that were submitted in support of the search warrants that were issued
18 and executed on August 11, 2005. (Paragraphs 117-118 of Neirinckx Affidavit,
19 Ex. 5 to Ct. Rec. 361; Paragraphs 111-112 of Nierinckx Affidavit, Ex. 7 to Ct.
20 Rec. 361; Paragraphs 117-118 of the Neirinckx Affidavit, Ex. 8 to Ct. Rec. 361).
21 The paragraphs contained in each of these affidavits are identical as to the

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23 ¹⁷There was no violation of the Fifth Amendment right against self-
24 incrimination since none of the Defendants were in “custody” when they were
25 interviewed by Detectives Beck and Tafoya. *United States v. Crawford*, 372 F.3d
26 1048, 1059 (9th Cir. 2004) (en banc). There was also no violation of the Sixth
27 Amendment right to counsel since formal adversary proceedings had not been
28 initiated against the Defendants at the time these interviews took place. *McNeil v.*
Wisconsin, 501 U.S. 171, 175-76, 111 S.Ct. 2204 (1991).

1 information contained therein. None of that information pertains to statements
2 allegedly made by any of the Defendants during the May 31 and June 6, 2005
3 visits, or to any documents or seals provided by Defendants to Beck and Tafoya
4 during those visits (listed at p. 639 of Ex. 9 to Ct. Rec. 361) .¹⁸ Even if these few
5 paragraphs were excised from the respective affidavits, there would still have been
6 probable cause for issuance of the warrants based on the remaining detailed
7 information found in the lengthy affidavits, each comprised of over one hundred
8 paragraphs and pages. This remaining information was derived from sources other
9 than Beck and Tafoya and their May 31 and June 6, 2005 visits to Suite 8B.

10 During oral argument, Defendants' counsel argued that what the Secret
11 Service got from their visit to Suite 8B on May 31, 2005 was an informant in the
12 person of Amy Hensley. Hensley was named as a Defendant in the Indictment, but
13 pursuant to a plea agreement, has pled guilty to Count 1 and is currently awaiting
14 sentencing. Hensley testified that at her June 8, 2005 meeting with Detective
15 Tafoya, he told her that he thought she was the one who had taken the boxes to
16 cover up financial wrongdoing of which she had been accused by Steven and

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25 ¹⁸ The court does not find credible the assertions by the Defendants that
26 once inside the interior of Suite 8B, Detectives Beck and Tafoya, without
27 permission from Defendants, rifled through drawers and file cabinets in search of
28 particular documents or items.

1 Dixie Randock.¹⁹ Detective Tafoya testified that he did suggest to Hensley that
2 she was responsible for taking the boxes. Hensley denied taking the boxes. A
3 review of the affidavits tendered in support of the search warrants subsequently
4 issued and executed does not reveal that any information obtained from Hensley
5 by Tafoya on June 8 was used to procure any of those warrants.

6 According to Hensley, the next time she met with Tafoya was on August 11,
7 2005, when he confronted her with the “diploma mill” allegations and urged her to
8 cooperate or risk going to prison.²⁰ Hensley testified that Tafoya asked her to call
9 Dixie and Steven Randock and she did so. According to testimony from Tafoya,
10 during Hensley’s telephone conversation with Dixie Randock. Mrs. Randock
11 simply denied that the Randocks were operating a “diploma mill.” According to
12 Hensley, Steven Randock essentially said nothing during his conversation with
13 her, and moreover, his end of the conversation was not recorded. Detective
14 Tafoya only heard Hensley’s end of her conversation with Mr. Randock. In sum,
15 there is no indication that any incriminating information was obtained from the
16 Randocks during these calls. Furthermore, Hensley has pled guilty, has agreed to
17 assist the government in this case, and has waived any argument that she was
18 coerced to assist the government in its investigation, or was otherwise the victim
19

20 ¹⁹ Detective Tafoya testified that he asked the Randocks on May 31 whether
21 they had any disgruntled employees who might be responsible for the “theft” of
22 the boxes. Agent Neirinckx testified that the Secret Service ROI showed that in
23 response to that query, Dixie Randock identified Hensley as someone who had
24 caused financial losses for the businesses owned and operated by the Randocks.
25 The Randocks also volunteered information that there had been a significant
26 discrepancy between checks that were written by Hensley and when those checks
27 had cleared the bank.

28 ²⁰ August 11 is the same day search warrants were executed for the seven
different locations mentioned in the “Background” section of this order at p. 4.

1 of any “outrageous” conduct by the government. In any event, the testimony of
2 Internal Revenue Service (IRS) Agent Janet Tompkins who was present with
3 Detective Tafoya during the August 11, 2005 meeting with Hensley, convincingly
4 rebuts any inference that Hensley was coerced into doing anything.

5 In sum, if there were “outrageous” conduct warranting suppression, it
6 appears there would be nothing of any consequence to be suppressed.

7 8 **III. CONCLUSION**

9 For the reasons set forth above, the Defendants’ Motion To Suppress
10 Evidence (Ct. Rec. 328) and Motion To Dismiss Indictment, Or Alternatively,
11 Suppress Evidence (Ct. Rec. 342) are **DENIED**.

12 **IT IS SO ORDERED.** The District Court Executive is directed to enter
13 this order and forward copies to counsel.

14 **DATED** this 1st day of February, 2008.

15
16 *s/Lonny R. Suko* _____

17 _____
18 LONNY R. SUKO
19 United States District Judge
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